In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5709

UNITED STATES OF AMERICA,

Appellant.

vs.

JOHN J. FULTON CO., a Corporation, Claimant of 48 Bottles, more or less, of an Article of Drugs, Labeled in part "Fulton's Compound Rx 1," and 24 Bottles, more or less, of an Article of Drugs, Labeled in part "Fulton's Compound Rx 2," Shipped by the John J. Fulton Company,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

Brief of Appellant

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STATEMENT OF FACTS

This is an appeal from a libel on certain drugs known as Fulton's Compound, to which exceptions to the libel were sutained, certain language being complained of on the bottle label, wrapper, and circular, a

typical quotation from which is the bottle label: "We have received many letters from physicians reporting cases designated therein as DIABETES that the use of this Compound was attended with decrease in the sugar in the urine, or improvement in the physical condition of the patient, or both, * * *." (See Apostles on Appeal, pages 10, 11, 12, 13, and 14, Exhibit A.)

ASSIGNMENTS OF ERROR

Assignments of error were made as to the formal orders entered in the matter, to-wit: in sustaining exceptions to the libel, in denying petition for re-hearing on the exceptions to the libel, and in signig an order for dismissal.

ARGUMENT

In this action, under the Food and Drugs Act, it is merely a question as to whether or not, as in the opinion of the appellant, in this matter a company can do by indirection what it cannot do by direction. The question is whether curative, remedial, or therapeutic claims can be made or set forth on the bottle label, the wrapper, and circular of drugs in which no direct allegation is made by the vendor of the articles as being

the statement of the vendor, but statements can be placed in the mouth of persons undesignated and referred to as physicians or letters from physicians in such language as this :"* * * Where the heart is involved or there is dropsy and the patient is on helpful heart treatment, elimination or tonics it is common practice to advise continuance of same with the Compound until no longer necessary." Perhaps such language can be construed as to make no direct curative, remedial, and therapeutic claims, but such a construction, in your appellant's opinion, is a unwarranted, unfair, and biased claim.

Referring to the brief on petition for re-hearing on exceptions of the libel, and requoting from said brief for purposes of clarity and unity in one brief, these cases were called to the attention of the Court:

United States vs. 95 *Barrels of Vinegar*, 265 U. S. 438, wherein the Supreme Court of the United States in realing with a case of misbranding under the Federal Food and Drugs Act, said:

"The statue is plain and direct. Its comprehensive terms contain every statement, design and device which may mislead or deceive. Deception may result from the use of statements not technically false or which may be literally true. *The aim of the statute is to prevent that resulting from indi-*

rection and ambiguity; as well as from statements which are false. It is not difficult to choose statements, designed and devices which will not deceive. Those which are ambiguous and liable to mislead should be read favorably to the accomplishment of the purpose of the Act. Citing *U. S. vs. Schider*, 246 U. S. 519, 522; *U. S. vs. Lexington Milling Company*, 232 U. S. 399, 409; *U. S. vs. Antikamnia Company*, 231 U. S. 654, 665" (Underscoring supplied.)

A case very closely in point to the instant case is *Bradley vs. United States* (C. C. A. 6th Circuit), 264 Fed. 79, (Page 23, Apostles on Appeal, and following). In that case Bradley had been shipping in interstate commerce a preparation bearing the following statements on the label: "Recommended in the treatment of Bright's disease, Diabetes, Dropsy, Cystitis, Gout, Rheumatism, Indigestion, Kidney and Bladder trouble," etc., "directions * * * ." A consignment of the produce was seixed by process of liebl, charging that the aforesaid statements on the label were false and fradulent. Bradley intervened as claimant and excepted to the libel:

(1) That the libel does not disclose that the waters contained in the bottles are misbranded because the label does not claim that the waters contained any ingredients or substance for the cure of any human ailment.

(2) The label described in the libel does not pretend that the waters contain medical agents effective as a remedy for human disease.

(3) That the labels set out in the libel do not amount in law to a misbranding.

The exceptions were overruled and the cause went to trial before a jury who returned a verdict in favor of the Government, upon which a judgment was entered condemning the product. The errors assigned in the Circuit Court of Appeals were as follows:

(1) The Court erred in failing to sustain exceptions to the libel.

(2) The Cuort erred in refusing to instruct the jury to find a verdict for the claimant.

(3) The Court erred in refusing the charge that the label on the bottles of water did not violate the Act of Congress, in that the said label made no statement regarding the therapeutic or curative effect of such waters.

(4) The Court erred in refusing to grant a new trial.

Concerning these assignments of error, the Circuit Court of Appeals for the 5th Circuit said:

(1) The first and third assignments raise the same question of law: Does the label as set out in the libel bear the interpretation sought to be placed on it by the Government; i. e., that the words, "Recommended in the treatment of" the diseases named, properly construed, mean that the said water had a curative or therapeutic quality? If the Court could say that they did not have this meaning, then it should have sustained the exceptions and given the charged asked. If it could not, then no error was committed in overruling the exception and refusing to give the charge. The construction of the language used in the label was in the first instance for the Court; the falsity or truth and the intent of the claimant were for the jury to find from the testimony before it.

(2) It seems to us that words, "Recommended in the treatment of Bright's disease," etc., "Directions * * * ."—could only mean that the use of the water in the treatment of the disease named would effect a cure or alleviation of such diseases; otherwise, why recommend it? Unless this means that the water did contain elements or ingredients which would alleviate or cure the diseases named, when taken according to the directions thereon contained, it was a waste of printer's ink. Would not anyone suffering from any

one of the diseases named understand that by the taking of the water his ailment would be alleviated or cured by reason of the ingredients contained in the water? It seems to us that he would. Treatments would only be taken with a view to alleviation or cure, and a water possessing elements or ingredients favorable to that end only would be recommended.

We think this label clearly susceptible of this construction, and that no error was committed, either in overuling the exception or refusing the charge.

Particularly interesting is the language, "Deception may result from the use of statements not technically false or which may be literally true." (*U. S. vs.* 95 *Barrels of Vinegar*, 265, U. S. 438.) Such language as has been quoted here, it would seem, clearly falls within that rule. It is true perhaps that the statements on the labels and wrappers, taken literally, do not say in so many words that Fulton's Compound is effective in the mitigation or cure of any disease. They do, however, by innuendo, create that impression more effectively than could be done by any direct statement. To take the position that such language may be read literally only is to lose sight of the purpose of the Food and Drugs Act as it is applied to drugs. Such a ruling

would have the effect of letting down the bars to countless fraudulent patent medicines, the manufacturers of which are constantly attempting to use the facilities of interstate commerce to effectuate greater sale of their products. The cases cited by the appellee, *United States vs. Tuberclecide Co.*, 252 Fed. 938, and *United States vs. Natura Co.*, 250 Fed. 925, can be distinguished and differentiated completely from the situation in point, wheras in our opinion, *Bradley vs. United States*, 264 Fed. (6th Circuit) 79, is in some measure a precedent for the appellant's position in this case.

Further than the basic rights involved herein, the appellant in this cause feels that the Court erred in sustaining exceptions to the libel for the reason that while these words are not actionable *per se*, yet they are in that middle ground where they are susceptible to being construed for having a defamatory meaning, and in such middle ground a jury should be left to determine whether or not the words used constitute a remedial or therapeutic claim on this drug label. It was not within the province of the court, but rather within the province of the jury to settle the claim in this case; *Baker vs. Warner*, 231 U. S. 588, 594, *E. I. Du Pont De Nemours & Company vs. Nashville Ban-*

ner Publishing Company (C. C. A. 6th Circuit), 12 Fed. (2d) 231; *Du Pont Engineering Company vs. Nashville Banner Publishing Company* (D. C. M. D. Tenn.), 13 Fed. (2d) 186, and *Kraft vs. New York Herald Company* (D. C. S. D. N. Y.) 6 Fed. (2d) 644.

For the reasons set forth herein, the appellant feels that the sustaining of the exceptions to the libel was error, and for petitioning for relief.

Respectfully submitted,

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